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Taking History Seriously: Marjorie Taylor Greene, Reflections on Progressive Lawyering, and Section 3 of the Fourteenth Amendment

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TAKING HISTORY SERIOUSLY: MARJORIE TAYLOR GREENE, REFLECTIONS ON PROGRESSIVE LAWYERING, AND SECTION 3 OF THE FOURTEENTH AMENDMENT

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History has lessons to teach, and lawyers can learn from and use history in ways other than by cherry-picking from it. This Article contends that, while American history may be vexed, progressive lawyers can fully embrace history and hold it up into the light for consideration, all in service of progressive ends.

This Article describes a recent litigation that illustrates the point. In March 2022, the Author, together with other lawyers and a non-partisan pro-democracy group, represented voters from Georgia's fourteenth congressional district in their effort to disqualify U.S. Representative Marjorie Taylor Greene from the Georgia ballot—based upon Section 3 of the Fourteenth Amendment of the U.S. Constitution. The effort involved an exploration of the history of insurrections in the early Republic, the year and the symbol "1776," and the Fourteenth Amendment itself. The Author offers reflections and lessons from that experience.

INTRODUCTION

What is the proper role of history in progressive lawyering? It is a question well-suited for the leafy precincts of a law school academic conference, but it is of little practical significance for private law firm civil rights litigators like me. We represent individual clients in individual cases. Our job is to win. If history can help, we'll take it; if it can't, we'll move on and look elsewhere

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for support. This approach is known as "law office history"[1]—a polite way of describing the practice of cherry-picking historical facts in service of a desired outcome. This Article is not about that. This Article is about taking history seriously—and comprehensively, on its own terms—and deploying it expansively in the context of day-to-day litigation. It suggests that our American history, vexed as it may be, has lessons to teach us that can be used in civil rights litigation for progressive ends.

These issues arose in my own practice in March 2022. Together with lawyers from the nonpartisan pro-democracy group Free Speech for People ("FSFP") and Atlanta-based voting rights lawyer Bryan Sells, I represented voters from Georgia's fourteenth congressional district in their effort to disqualify U.S. Representative Marjorie Taylor Greene from the Georgia ballot—based upon Section 3 of the Fourteenth Amendment of the U.S. Constitution.[2] This Article discusses the role that history played in that effort. In writing about this case, I suggest that a broad understanding of history can—and should—be applied to the practice of progressive lawyering. My thinking is derived not from deep scholarship, but from my practical experience as a litigator and my personal interest in American history. The specific experience I use as the touchstone here, the Greene hearing,[3] occurred not in the Highest Court in the Land in Washington, D.C., but in one of the lowest—a state administrative tribunal—in the Deep South.

Few undertakings in legal writing are more fraught than when a lawyer tries to distill universal lessons from a single courtroom experience. I will do my best to avoid that trap. My goal is modest: to offer my experience as a reminder that history is not the exclusive province of partisan judges or lawyers, especially those on the ideological right. History belongs to everyone, and it

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[1] *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 (1965) (coining the term "law office history"); Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1098 (2009) (describing "law office history" as "a results oriented methodology" where data "is selectively gathered and interpreted to produce a preordained conclusion").

[2] *See* Notice of Candidacy Challenge, *In re* Challenge to the Constitutional Qualifications of Rep. Marjorie Taylor Greene, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Mar. 24, 2022). *See generally Georgia Voters Challenge Rep. Marjorie Taylor Greene's Candidacy for Re-election Under Fourteenth Amendment's Insurrectionist Disqualification Clause*, FREE SPEECH FOR PEOPLE (Mar. 24, 2022), https://freespeechforpeople.org/georgia-voters-challenge-rep-marjorie-taylor-greenes-candidacy-for-re-election-under-fourteenth-amendments-insurrectionist-disqualification-clause [https://perma.cc/8DXK-RP8T] (explaining the challenge against Representative Greene).

[3] *See* Transcript of Oral Argument, Rowan et al. v. Greene, 2222582-OSAH-SECSTATE-CE-57-Beaudrot (2022) (No. 2222582) [hereinafter Greene Hearing Transcript].

can, when considered properly, serve to support important and progressive goals, sometimes in surprising ways.

This Article proceeds as follows. Part I frames the "problem" by touching briefly on progressives' suspicion of history, and how conservative partisans have hijacked history for their own ends. It is an unhappy saga that finds its apotheosis in *Dobbs v. Jackson Women's Health Organization*.[4] Part II discusses two discrete historical questions that stood at the center of our efforts to disqualify Representative Greene from the Georgia ballot: the meaning of the word "insurrection" under Section 3 of the Fourteenth Amendment, and the import of the term "1776" as used in the run-up to the January 6, 2021, attack on the U.S. Capitol. Lastly, in Part III, I suggest that the Greene experience, like all litigations, does have lessons to teach. These lessons may not be for universal application, but they are part of the learning that we achieve in cases at common law, win, lose, or draw.

I. THE "PROBLEM" OF HISTORY

In the search for answers and support, progressive lawyers rarely turn first to history—and with good reason. American history is punctuated by horrors: chattel slavery; the subjugation of native peoples; racism, xenophobia, eugenics, and Jim Crow; and the marginalization of women. These are central, inescapable features of our national story and, in these ways, our history runs counter to our contemporary values. Privileging history risks making us complicit, after the fact, in validating, ignoring, or excusing what can never be validated, forgotten, or excused.

Moreover, in the legal field, quite differently from the field of historical study itself,[5] history has been hijacked to serve a specific ideological agenda. Under the banner of "originalism," conservative judges and lawyers have embarked upon a decades-long project of seeking to render history their exclusive province, of deploying history—or their *version* of history—to justify what are, at base, policy judgments rooted in ideology and religion.[6] The *Dobbs* decision, with its appeal to "700 years of 'Anglo-American common law,'" its invocations of centuries-old commentaries in a case about contemporary women's rights, and its stubborn

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[4] *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[5] *See, e.g.*, JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM (McGraw-Hill ed., 7th ed. 1994) (1947); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (Harper & Row ed., 1st ed. 1980).

[6] *See, e.g.*, *Dobbs*, 142 S. Ct. at 2246-49. *Compare* District of Columbia v. Heller, 554 U.S. 570 (2008) (ruling that the Second Amendment's text, and its drafting history, demonstrate that it connotes an individual right to keep and bear arms) *with* Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625 (2008).

insistence on spelling the word "fetus" in the medieval style—is the most recent example of this approach, and one of the more egregious ones.[7]

The overall effect has been to stigmatize history. Consider, for example, a recent editorial in the *New York Times* by two progressive law professors, Ryan D. Doerfler and Samuel Moyn.[8] They argue that constitutionalism—the idea that the Constitution stands above ordinary laws as a guarantor of liberty—should be abandoned because it "inevitably orient[s] us to the past" in a way that supports conservative legal outcomes.[9] To those who seek an expansive reading of the law—one that welcomes all people, experiences, and points of view into a diverse and tolerant polity—history can look like a poison, a thing to be avoided. No good can come of it.

But is that really true? Although it is certainly the case that, in recent decades, conservative outcomes have found support in history, is that, as Professors Doerfler and Moyn suggest, "inevitable"?[10] Is history a dead end for progressives? The experience of the Greene disqualification hearing suggests that the answer to these questions is no.

II. SECTION 3 OF THE 14TH AMENDMENT: HISTORY AND A CONTEMPORARY APPLICATION

If Reconstruction was America's "second founding,"[11] the Reconstruction Amendments[12]—and the Fourteenth Amendment in particular—constitute the Nation's post-slavery Bill of Rights. Ratified in 1868, the Fourteenth Amendment guarantees birthright citizenship, due process, and equal protection under the law to all persons in the United States.[13] These simple yet profound principles are enshrined in Section 1 of the Amendment and generally well-understood. But, until quite recently, very few people had studied or considered the implications of the Amendment's Section 3.[14]

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[7] *See Dobbs*, 142 S. Ct. at 2247.

[8] Ryan D. Doerfler & Samuel Moyn, Opinion, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html [https://perma.cc/LCU4-CPAG].

[9] *Id.*

[10] *See id*.

[11] *See, e.g.*, ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (W.W. Norton & Co. ed., 2019).

[12] *See, e.g.*, U.S. CONST. amend. XIII (prohibiting slavery); *id.* amend. XIV (due process and equal protection); *id.* amend. XV (voting rights).

[13] *Id.* amend. XIV, § 1.

[14] *See* Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS U. L.J. 639, 639-40 (2018) (contending that, although Sections 1 and 5 of the Fourteenth Amendment are well-known,

Nearly thirty years into a career as a constitutional lawyer, I had no idea what it said until sometime late in 2021. If we are to harness history in service of progressive values, the first thing we need to do with history is to *read* it.

Fortunately, some do.[15] In the wake of the events of January 6, 2021, the lawyers at FSFP focused their attention on Section 3 of the Fourteenth Amendment, its history, and its implications for contemporary events. Some months later, they brought it to my firm's attention. At the time, the details of the attack on the Capitol, and its origins, were still emerging in the media. Urgent questions were being asked about the role certain elected officials played in the events of that day. In this context, the lawyers at FSFP looked to Section 3 and saw an opportunity.

Section 3 of the Fourteenth Amendment provides in pertinent part:

> No person shall be a Senator or Representative in Congress . . . or hold any office . . . under the United States, or under any State who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.[16]

Nestled in the very Amendment that was enacted to serve as a new charter of freedom for formerly-enslaved people—and that would indeed serve as a cornerstone for the "rights revolution" of the mid-twentieth century[17]—Section 3, also known as the Disqualification

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"no one teaches anything about Sections 2, 3, and 4 . . . ."); Gerard Magliocca, *The 14th Amendment's Disqualification Provision and the Events of Jan. 6*, LAWFARE (Jan. 19, 2021, 1:43 PM), https://www.lawfareblog.com/14th-amendments-disqualification-provision-and-events-jan-6 [https://perma.cc/Z2JT-8RWE] (noting that before the violence at the Capitol on January 6, 2021, Section 3 of the Fourteenth Amendment "was one of the most obscure parts of the Constitution.").

[15] *See* N.Y.C. BAR ASS'N, REPORT BY THE TASK FORCE ON THE RULE OF LAW ON SECTION 3 OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION—THE DISQUALIFICATION CLAUSE (2022), https://s3.amazonaws.com/documents.nycbar.org/files/20221096-DisqualificationClauseRecommendations.pdf (arguing that Congress should pass a statute to allow for enforcement of Section 3 of the Fourteenth Amendment).

[16] U.S. CONST. amend. XIV, § 3.

[17] *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (holding that the segregation of children in public schools solely on the basis of race deprives

Clause, actually restricts the rights of a subset of Americans: those who had sworn, and then betrayed, their oath to uphold the Constitution.[18] The specific historical context from which this provision emerged could hardly be clearer. Ratified shortly after the end of the Civil War, Section 3 was intended to bar oath-breaking traitors—in other words, former government officials who had switched allegiances and supported the Confederacy—from federal and state office.[19]

Almost immediately after ratification, former Confederates bent on retaking political power from newly-enfranchised Black citizens began petitioning Congress to "remove the disability" Section 3 had imposed. The Clause permitted Congress to do this with two-thirds votes in both Houses.[20] What started as a trickle of requests for rehabilitation quickly became a raging river, as the names of hundreds of former Confederates were attached to bills in Congress and pushed through both chambers, cleansing their records of treason and opening the door to their return to public office.[21] By 1872, the business of listing, hearing, and deciding such petitions one by one, or even *en masse*, had become overwhelming.[22]

In 1872, with Reconstruction in full retreat and the so-called Redemption movement of white supremacy on the march

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children of minority groups of equal educational opportunities, violating the Equal Protection Clause); Griswold v. Connecticut, 381 U.S. 479 (1965) (ruling that an implied right of privacy exists within the Bill of Rights); Loving v. Virginia, 388 U.S. 1 (1967) (declaring laws prohibiting interracial marriage as unconstitutional); Shapiro v. Thompson, 394 U.S. 618 (restating that there is a fundamental right to travel that is unrestricted between the states); Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[18] U.S. CONST. amend. XIV, § 3.

[19] *See* Magliocca, *supra* note 14.

[20] *See Congress Restores Confederates' Office-Holding Rights with the Amnesty Act of 1872*, EQUAL JUST. INITIATIVE, https://calendar.eji.org/racial-injustice/may/22 [https://perma.cc/T4JV-GZTV] (last visited Oct. 20, 2022).

[21] *See* Laurence H. Tribe & Elizabeth B. Wydra, Opinion, *Confederate Amnesty Act Must Not Insulate the Jan. 6 Insurrectionists*, BOS. GLOBE (Mar. 11, 2022), https://www.bostonglobe.com/2022/03/11/opinion/confederate-amnesty-act-must-not-insulate-jan-6-insurrectionists [https://perma.cc/C9Z2-CUPK] (noting that the final private bill Congress considered—before passing the Amnesty Act—included approximately 17,000 names); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 112-21 (2021).

[22] Indeed, it was an unwritten rule that "everyone who asked for [amnesty] . . . was freely granted remission of penalty." *See* Magliocca, *supra* note 21, at 112 (citing JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 512 (Norwich, Conn., Henry Bill Publ'g Co. 1886)).

throughout the South,[23] Congress passed the Amnesty Act.[24] The Act lifted the disability imposed by Section 3 for virtually *all* affected persons.[25] To some, it appeared that, by legislative action, Congress had rendered Section 3 a dead letter.[26]

FSFP certainly did not see it that way, and neither did I. In the first place, since when can a constitutional provision be repealed or eviscerated by mere legislation? It cannot. The Amnesty Act of 1872, viewed in its proper historical context, was legislation directed at relieving a particular class of then-living persons—former Confederates who had previously sworn an oath to the Constitution—from the "disability" of being disqualified from office at a specific historical moment (i.e., post-Reconstruction). It was, in other words, legislation passed *pursuant* to a constitutional provision—Section 3's two-thirds-vote escape hatch. But it did not have the effect of *invalidating* the constitutional rule for *all* time. Section 3, it seemed to us, was not a dead letter at all.[27]

A. Applying Section 3 to January 6th: The Recent "Insurrection" and the Next "1776"

By December 2020, the Nation was facing a crisis: A sitting president was refusing to accept the results of the presidential election. The country was awash in (baseless) claims of "election

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[23] *See* Matthew Hild, *Redemption*, NEW GA. ENCYC. (July 21, 2020), https://www.georgiaencyclopedia.org/articles/history-archaeology/redemption.

[24] Act of May 22, 1872, ch. 193, 17 Stat. 142.

[25] *Id.* (providing that the disability imposed by Section 3 is "hereby removed from all persons whatsoever" except for persons who had served as members in Congress, in the U.S. military, or as executive officers immediately prior to the Secession crisis that led to the Civil War).

[26] In the post-Reconstruction era, Section 3 of the Fourteenth Amendment was used exactly once: in the 1919 case of Victor Berger. Berger was an avowed socialist and member of the U.S. House of Representatives from Wisconsin. As a result of Berger's opposition to World War I, the House refused to seat Berger and voted to disqualify him under Section 3, expressly rejecting his objections that Section 3 only applied to the Civil War. Berger was later convicted under the Espionage Act for his advocacy, but the U.S. Supreme Court overturned his conviction. *See* JENNIFER ELSEA, CONG. RSCH. SERV., LSB10569, THE INSURRECTION BAR TO OFFICE: SECTION 3 OF THE FOURTEENTH AMENDMENT 2 (2022). In Berger's ruling, the Court did *not* decide whether Section 3 was invalidated by the Amnesty Act of 1872; that question remains, at least at the Court, an open one. *See id.* at 6. *Cf.* Cawthorn v. Amalfi, 35 F.4th 245 (4th Cir. 2022) (holding that Amnesty Act of 1872 did not prospectively bar application of Section 3 to post-1872 insurrectionists); Greene v. Raffensperger, No. 22-CV-1294-AT, 2022 WL 1136729, at *22-25 (N.D. Ga. 2022) (same), *appeal filed* (11th Cir. Apr. 19, 2022).

[27] This view of the status of Section 3 after passage of the Amnesty Act is not shared by all. Indeed, it was a major point of contention in the courts in 2022, as FSFP sought to apply Section 3 to contemporary circumstances—a part of the story that is itself fascinating, but beyond the scope of this Article.

fraud," and supporters of then-President Donald J. Trump—including members of Congress—began calling for large demonstrations in Washington, D.C., on the day of the Electoral College vote count, January 6, 2021.[28] Their rallying cry expressed their stated goal for the day: to "stop the steal" of the 2020 election by blocking Congress's certification of the 2020 election results.[29] One such supporter was the newly elected U.S. Representative from Georgia's fourteenth congressional district, Marjorie Taylor Greene.

What happened next was what many refer to simply as "January 6th," the unprecedented violent attack on the U.S. Capitol by supporters of then-President Trump.

In the year that followed the attack, its origins and purposes came into sharper focus, and the modern implications of Section 3 became clear. If the attack on the Capitol was, indeed, an "insurrection"—as both the House and the Senate would find in the wake of these events;[30] and if Representative Greene and others like her did, in fact, "engage in insurrection" by providing support to perpetrators of that attack; then she and other public officials who had taken an oath of office and betrayed it were constitutionally disqualified from continuing to serve. Such disqualification would preclude them from standing for reelection for the offices they held.

This is the argument that Georgia voters, represented by FSFP, my firm, and Mr. Sells, presented to the Georgia Secretary of State, Brad Raffensperger, in March 2022.[31] Secretary

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[28] Alan Feuer et al., *Jan. 6: The Story So Far*, N.Y. TIMES (June 9, 2022), https://www.nytimes.com/interactive/2022/us/politics/jan-6-timeline.html [https://perma.cc/9HNF-QBUZ].

[29] William M. Arkin, *'Stop the Steal' Was a Donald Trump Fans' War Cry Even Before Election Day*, NEWSWEEK (Nov. 3, 2021), https://www.newsweek.com/stop-steal-was-already-donald-trump-fans-war-cry-even-before-election-day-1644981 [https://perma.cc/AWJ2-E78M].

[30] *See* H.R. Res. 503, 117th Cong. (2021) ("Whereas January 6, 2021, was one of the darkest days of our democracy, during which insurrectionists attempted to impede Congress's Constitutional mandate to validate the presidential election and launched an assault on the United States Capitol . . . ."); S. Res. 16, 117th Cong. (2021) (addressing, in part, "the charge of incitement of insurrection in the Article of Impeachment approved by the House on January 13, 2021 . . . [and] whether Donald John Trump is subject to the jurisdiction of a court of impeachment for acts committed as President . . . .").

[31] Notice of Candidacy Challenge, *In re* Challenge to the Constitutional Qualifications of Rep. Marjorie Taylor Greene, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Mar. 24, 2022). At or around the same time, FSFP filed a similar petition in North Carolina to disqualify U.S. Representative Madison Cawthorn under Section 3. Additionally, FSFP, working with my law firm, filed a petition in Arizona to disqualify U.S. Representatives Andy Biggs and Paul Gosar, and state representative Mark Fincham for their efforts in facilitating the January 6th insurrection. *See Arizona Voters Challenge*

Raffensperger was the official responsible for determining whether proposed candidates in Georgia's May 2022 primary ballot met the qualifications for office. Although Representative Greene had otherwise met the qualifications, such as age and residency, our petition asserted that she was disqualified from serving in the office because (1) the January 6th attack had been an "insurrection" within the meaning of Section 3; and (2) Greene had, by her words and actions, "engaged in insurrection," in contravention to the oath she had taken upon assuming office. As a result, Secretary Raffensperger referred our petition to the Office of State Hearings and Appeals for a factual hearing.[32]

In April 2022, a hearing was held on these issues before Administrative Law Judge Charles Beaudrot. Dozens of discrete pieces of documentary and video evidence were admitted, and two witnesses testified, legal historian Gerard Magliocca and Representative Greene. Two aspects of the presentation got to the heart of the matter: testimony about the historical meaning of the word "insurrection," and the evidence presented about what organizers of the January 6th demonstrations, including Representative Greene herself, meant in their public invocations of the term "1776."[33] Both offered opportunities for us to use history expansively for progressive ends.

1. "Insurrection"

As the party seeking disqualification, it was our burden to demonstrate that what had happened at the U.S. Capitol on January 6th constituted an "insurrection." This was not undisputed territory—not by a long shot.

The facts themselves were not disputed; they had unfolded on national television. A mob of Trump supporters had stormed the Capitol, attacking Capitol Police, destroying property, and invading both chambers of Congress. Their stated goal was to physically prevent Congress from certifying the Electoral College vote, a process required by the Twelfth Amendment.[34] Their efforts

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Congressmen Gosar and Biggs and State Rep. Finchem, Candidate for Secretary of State, Under Fourteenth Amendment's Insurrectionist Disqualification Clause, FREE SPEECH FOR PEOPLE (Apr. 7, 2022), https://freespeechforpeople.org/arizona-voters-challenge-congressmen-gosar-and-biggs-and-state-rep-finchem-candidate-for-secretary-of-state-under-fourteenth-amendments-insurrectionist-disqualification-clause [https://perma.cc/Y7UE-UNJY].

[32] *See* Notice of Candidacy Challenge, *In re* Challenge to the Constitutional Qualifications of Rep. Marjorie Taylor Greene, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot 5-7 (Mar. 24, 2022).

[33] *See* Greene Hearing Transcript, *supra* note 3, at 151-81.

[34] *See* U.S. CONST. amend. XII (providing process for Congress to count the electoral votes).

succeeded for several hours. The joint session of Congress was suspended, and the counting of the Electoral College votes was delayed until the following morning, when order was restored by the National Guard.[35]

It was an ugly and unprecedented incident, to be sure. But was it an "insurrection" within the meaning of Section 3?

Representative Greene asserted that it was not. She argued that what had happened in Washington, D.C., on January 6th was, for the most part, peaceful, First Amendment-protected activity.[36] As for the violence in the Capitol that day, she contended that it was nothing more than "a riot," random lawlessness carried out by the proverbial few bad apples.[37] January 6th was no more an "insurrection," Greene claimed, than if a handful of hooligans had stood in the gallery of the Senate chamber and heckled its members before being hauled away by Capitol Police.[38] It was certainly nothing like the Secession crisis or the Civil War—the direct historical antecedents to Section 3—in which states had openly declared a separate republic, raised a uniformed army, refused to recognize the binding nature of laws passed by Congress or the acts of the president, and launched an all-out war on the United States.[39]

We, of course, saw the matter differently. So, too, did history—and not just the narrow history of Reconstruction and the Reconstruction Amendments, but America's broad historical experience dating back to the very early years of the Republic.

Our witness on this issue was Gerald Magliocca, a legal historian and law professor. Professor Magliocca described this country's history of insurrections, many of which occurred well before the Civil War. As Magliocca testified, Shays' Rebellion (1786-87) and the Whiskey Rebellion (1794-96)—both of which were clearly insurrections—shared three important characteristics: (1) violence that was (2) aimed at impeding or overturning a specific governmental process; and that (3) could not be quelled by ordinary law enforcement means.[40] Neither involved the kinds of formal

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[35] *See, e.g.*, Feuer et al., *supra* note 28; Amber Phillips, *What We Know—and Don't Know—About What Trump Did on Jan. 6*, WASH. POST (July 22, 2022, 1:20 PM), https://www.washingtonpost.com/national-security/2022/06/29/trump-january-6-timeline [https://perma.cc/TWK9-9LK6].

[36] *See* Greene Hearing Transcript, *supra* note 3, at 34-35 (stating that Greene's challengers wanted "to hold against her First Amendment protected speech" and quoting Greene, who had said previously that "[t]he people will remember the Patriots who stood for election integrity.").

[37] *See id.* at 39.

[38] *See id.* at 40.

[39] *See generally* Magliocca, *supra* note 21, at 87-90; William G. Gale & Darrell M. West, *Is the US Headed for Another Civil War?*, BROOKINGS INST. (Sept. 16, 2021), https://www.brookings.edu/blog/fixgov/2021/09/16/is-the-us-headed-for-another-civil-war/ [https://perma.cc/UA3S-L3Z4].

[40] *See* Greene Hearing Transcript, *supra* note 3, at 60-65.

declarations, breakaway states, or clashes of uniformed armies that defined the Civil War.[41]

FSFP's legal director, Ron Fein, established these principles in his direct examination of Professor Magliocca. Then Fein went a step further, asking Professor Magliocca whether "reasonably-educated nineteenth century Americans" would have been aware of Shays' Rebellion and the Whiskey Rebellion, and whether they would have *understood* these incidents as "insurrection[s]."[42] Magliocca responded that all nineteenth-century Americans would have regarded these previous attacks on government authority as "insurrections," even though they were quite different from the events that led to the Civil War.[43] This testimony was an exploration of "historical memory" at its broadest level.

Fein's question about what "reasonably educated Americans" of the Reconstruction era would have understood was a creative way of getting at the issue of how history can teach us.[44] It injected into the discussion a *societal* understanding of the term "insurrection," and it expanded the historical inquiry from what political leaders wrote and said about Section 3 at the precise time of its ratification, to what people more generally understood about it and how they experienced it.[45] To my way of thinking, it was a great example of a progressive lawyer using an expansive conception of what counts as history, while staying within conventional interpretative practice (i.e., discerning meaning from contemporary understandings of the text).

It was a small moment in the Greene hearing but, to me, a significant one. Fein's conception allowed us to escape the narrow, lawyerly confines of divining legislative history, a task that even the courts concede is fraught and often unreliable.[46] And it offered a history-based response to Greene's "handful of hooligans" defense.[47] As it turns out, in American history, insurrections are *typically* spontaneous, and *usually* involve loosely organized groups

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[41] *See, e.g.*, *On This Day, Shays' Rebellion Starts in Massachusetts*, NAT'L CONST. CTR. (Aug. 29, 2021), https://constitutioncenter.org/blog/on-this-day-shays-rebellion-starts-in-massachusetts [https://perma.cc/D5B2-YN78]; *The Whiskey Rebellion*, LIBR. OF CONG., https://guides.loc.gov/this-month-in-business-history/august/whiskey-rebellion [https://perma.cc/5LG6-ABQA] (last visited Oct. 20, 2022).

[42] *See* Greene Hearing Transcript, *supra* note 3, at 62.

[43] *See id.* at 64-65.

[44] *See id.* at 61.

[45] *See id.* at 60-76.

[46] *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 39-45 (2022); City of Chicago v. Env't Def. Fund, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law . . . .").

[47] *See supra* note 39 and accompanying text. *See also* Greene Hearing Transcript, *supra* note 3, at 40.

of citizens bent on using violence to bring government operations to a halt.[48] Formal secession and uniformed armies in the field, as appeared during the Secession crisis, are the historical exception, not the rule.[49] Professor Magliocca's and Ron Fein's appreciation of history, and their willingness to engage with it expansively and conceptually, is a lesson for civil rights lawyers. History is inclusive, and it encompasses the broad society and the sweep of time. It is not something that we need to sidestep, avoid, or pretend does not exist. On the contrary, it is something we can embrace—and utilize.

2. "1776"

From the beginning, we knew that it would be challenging to prove that Representative Greene had herself "engaged in insurrection."[50] After all, on January 6th, Greene had not personally rampaged through the Capitol or assaulted Capitol Police;[51] when these events were occurring, she was on the floor of the House lodging objections to the Electoral College count, a wholly lawful exercise of her constitutional powers.[52] Our theory of engagement was anchored in Greene's role as a catalyst and a provocateur in the run-up to January 6th. Specifically, we argued that she had used her leadership position, words, and actions to create the conditions to justify and actually provoke violence at the Capitol.[53] An important

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[48] *See* Greene Hearing Transcript, *supra* note 3, at 63.

[49] During the hearing, FFSP's Ron Fein contended that "the way that insurrections are organized nowadays is less in uniforms with military hierarchies and chains of command, less with detailed military plans of battle, and more through social media . . . [t]hat's the era that we're living in." *See id.* at 22.

[50] U.S. CONST. amend. XIV, § 3.

[51] In contrast, the case against New Mexico's Otero County Commissioner Couy Griffin was much more straightforward. Indeed, Commissioner Griffin was removed from office by a New Mexico judge under Section 3 because Griffin "took on a leadership position within the mob at the Capitol" on January 6th and boasted about his involvement on social media afterwards. *See* Press Release, Citizens for Responsibility and Ethics, Judge Removes Griffin from Office for Engaging in the January 6 Insurrection (Sept. 6, 2022), https://www.citizensforethics.org/news/press-releases/judge-removes-couy-griffin-from-office-for-engaging-in-the-january-6-insurrection [https://perma.cc/LS6C-DXUD] [hereinafter CREW Press Release].

[52] *See* 3 U.S.C. § 15 (providing method for objections by members of Congress to electoral votes).

[53] Specifically, FSFP's Ron Fein described Greene's role: "[E]ven after she took the oath on January 3rd to uphold the Constitution and defend it against all enemies, foreign and domestic . . . [her role] was severalfold: [T]o bring people to D.C. . . . to contribute in the plan; and to signal that January 6th would be, as she said herself on January 5th, 'our 1776 moment,' a coded phrase with great significance[;] . . . she urged and encouraged and helped facilitate violent resistance to our own government, our democracy, and our Constitution. And in

piece of evidence on that score was Greene's use of the term "1776."[54]

To begin, we needed to establish that "1776," as used by the January 6th conspirators, was neither a flowery rhetorical reference to the historical year 1776 that every American learns about in school, nor a patriotic gesture to the symbolic "1776" of liberty, equality, and freedom, that every American venerates on the Fourth of July. Instead, January 6th was all about "1776" the *slogan*—a term used by right-wing extremists on social media and elsewhere as code for violence aimed at the government.[55]

Second Amendment advocates had begun promoting this usage of "1776" some years earlier as shorthand for the alleged "constitutional right" to use guns *against* government, and to protect the constitutional right to own guns *from* government.[56] As we proved at the hearing, Representative Greene had trafficked in such talk as recently as the 2020 election cycle.[57] By the post-election

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doing so, she engaged in exactly the type of conduct that triggers disqualification under Section 3 . . . which is to say she engaged in insurrection." *See* Greene Hearing Transcript, *supra* note 3, at 24.

[54] *See id.* at 24, 151-80.

[55] *See* Washington Post Staff, *Identifying Far-Right Symbols That Appeared at the U.S. Capitol Riot*, WASH. POST (Jan. 15., 2021, 2:56 PM), https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot (noting that references to "1776" grew substantially amongst conspiracy theorists and Trump allies—including Representative Greene—in the wake of Trump's 2020 election loss). In 2020, an online shop dubbed the "1776.shop"—selling merchandise of the 1776 symbol—was founded by members of the Proud Boys, a far-right group whose leaders were indicted in June 2022 for seditious conspiracy. *See id.*; Press Release, U.S. Dep't of Just., Leader of Proud Boys and Four Other Members Indicted in Federal Court for Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach (June 6, 2022), https://www.justice.gov/opa/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-and [https://perma.cc/QV8K-ETG2].

[56] No such right exists, of course, as Representative Jamie Raskin demonstrates in his September 2022 *New York Times* opinion piece. *See* Jamie Raskin, Opinion, *The Second Amendment Gives No Comfort to Insurrectionists*, N.Y. TIMES (Sept. 27, 2022), https://www.nytimes.com/2022/09/27/opinion/us-second-amendment.html [https://perma.cc/MNF5-NFXR].

[57] During Greene's testimony, we presented a video interview that then-candidate Greene gave to gun-rights advocate Chris Dorr in October 2020. *See* Mother Jones, *Marjorie Taylor Greene: "It's Earned with the Price of Blood,"* YOUTUBE (Jan. 29, 2021), https://www.youtube.com/watch?v=J4rY-KL2JHI [https://perma.cc/VL5Y-38K4]. In the interview, candidate Greene discussed the importance of guns in ensuring that ordinary citizens could resist "a tyrannical government;" she talked about how, once freedoms are "taken away" by government, they must be "taken back with the price of blood." *See id.*; Greene Hearing Transcript, *supra* note 3, at 268. Mr. Dorr, sitting beside her, nodded along—in a shirt bearing the words: "I'm 1776% Sure That No One Is Taking My Guns Away." Rep. Greene testified she did not "remember seeing" the words, in large type, on Mr. Dorr's shirt. *See id.* at 158-68. More generally, we also proved that before taking the

period in late 2020, the term's meaning had expanded to include a claimed right to use violence to block *any* government action deemed inimical to individual "freedom"—including certifying then-candidate Joseph R. Biden as the winner of the 2020 election.[58] For example, it emerged that the Proud Boys, a violent extremist group, had developed a plan to storm government buildings in Washington, D.C., on January 6th to keep then-President Trump in power; the plan was called "1776 Returns."[59]

Against this backdrop, we presented Representative Greene's use of the term "1776." It happened on national television on January 5, 2021, the night before the attack on the Capitol. Interviewed on the right-leaning outlet *Newsmax*, Representative Greene was asked: "What is your plan for tomorrow? How do you plan to handle what could possibly go down in this joint session of Congress? What are you prepared for?"[60] She responded: "I will echo the words of many of my colleagues . . . in our GOP conference: *This is our 1776 moment*."[61] To signal its importance to her followers, Greene posted the *Newsmax* clip on her campaign Facebook page; it was still available there on the date of the hearing,

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oath of office, Greene had been forthright in her support of violence as a political tactic and using force as a means to stop the certification of Biden as the new president. Among other things, Greene had "liked" a tweet that suggested that House Speaker Nancy Pelosi should be removed from office by "a bullet in the head;" and she told viewers, in a staged video, that "we can't allow [Congress] to transfer power peacefully like Joe Biden wants." *Id.* at 118-19, 186-89. Confronted with these statements at the hearing, Greene suggested that they had been taken out of context or were not her words. *Id.*

[58] A December 2020 tweet by Ali Alexander, a self-described "friend" of Greene and organizer of the "Stop the Steal" rally that took place on January 6th, was another piece of evidence tying Greene to the term. *See* Greene Hearing Transcript, *supra* note 3, at 174, 178. Responding to a tweet from Greene that suggested that Senate Majority Leader Mitch McConnell and House Speaker Pelosi might try to short-circuit objections to the Electoral College count, Mr. Alexander tweeted: "If they do this, everyone can guess what we and 500,000 others would do to that building," referring to the Capitol. *Id*. The tweet concluded: "1776 is always an option." *Id.* Greene claimed she "[had] no idea" about the tweet. *Id.* at 179. *See generally* Will Sommer, *'Stop the Steal' Organizer in Hiding After Denying Blame for Riot*, DAILY BEAST (Jan. 10, 2021, 9:40 PM), https://www.thedailybeast.com/stop-the-steal-organizer-in-hiding-after-denying-blame-for-riot [https://perma.cc/3464-C9BS].

[59] *See* Ryan J. Reilly, *Court Document in Proud Boys Case Laid Out Plan to Occupy Capitol Buildings on Jan. 6*, NBC NEWS (June 15, 2022, 2:28PM), https://www.nbcnews.com/politics/justice-department/court-document-proud-boys-case-laid-plan-occupy-capitol-buildings-jan-rcna33755 [https://perma.cc/5DNS-TGFM].

[60] *See* Greene Hearing Transcript, *supra* note 3, at 166-74.

[61] *Id.* For a video clip of this interaction, see C-SPAN, *Hearing on Challenge to Rep. Marjorie Taylor Greene's Candidacy: Newsmax Video*, (Apr. 22, 2022), https://www.c-span.org/video/?c5011849/newsmax-video.

nearly sixteen months later. It was, we argued, Greene's "clarion call" for violence at the Capitol.[62]

The January 5 *Newsmax* clip was one of the most critical pieces of evidence in the case for disqualifying Representative Greene. Placed in its specific historical context—the fevered rantings of right-wing voices in the post-election period, and Greene's own videotaped statement in late 2020 that "we can't allow [Congress] to transfer power peacefully like Joe Biden wants and allow him to become our President,"[63]—it showed Greene using a well-worn codeword for violence on the eve of January 6th. Of course, Greene flatly denied that describing January 6th as "our 1776 moment" was a call to violence at the Capitol.[64] But history—understood broadly—had set a trap for Greene.

It was quite simple, really, and it required us to focus on the *historical* 1776—not the sentimental one, and not the slogan. Importantly, 1776, the year, had been a bloody one in our history. Colonists—soon to become Americans—had taken up arms against their government, the British Crown, in a struggle to overthrow imperial control, and a violent revolution was underway.[65] In 1776, the men who justified, organized, and directed that revolution, gathered in Philadelphia to make it official.[66] To us, these men are patriots and heroes. But, in their own time, they were insurrectionists; they were at war—literal, violent war—with their own government.[67]

When we reminded Representative Greene of this history, she refused to accept these cold, hard facts. Greene resisted acknowledging that the actual 1776 involved the violent overthrow

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[62] *See* Greene Hearing Transcript, *supra* note 3, at 257 (arguing that people knew exactly what she meant).

[63] *See id.* at 188-89, 269.

[64] Representative Greene's explanation for her use of the term shifted over the course of the hearing. First, she testified that her use of the term referred to her having "the courage" to file formal objections to the Electoral College—a response that made no sense in context, as the video itself showed. *Id.* at 168. Later, having been confronted with the Ali Alexander tweet, see *supra* note 58, and evidence that the Proud Boys had developed a plan (called the "1776 Returns") to storm government buildings called, Greene said could not remember why she used the term. *Id.* at 171-79.

[65] *See generally The American Revolution, 1763–1783: Overview*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/american-revolution-1763-1783/overview (last visited Oct. 20, 2022).

[66] *See generally The Declaration of Independence: A History*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/declaration-history (last visited Oct. 20, 2022).

[67] As Benjamin Franklin said at the time of the signing of the Declaration: "We must all hang together, or most assuredly we will all hang separately." Stephan Richter, *Ben Franklin, America's First Globalist*, GLOBALIST (Aug. 10, 2013), https://www.theglobalist.com/ben-franklin-americas-first-globalist.

of the British government in America.[68] Instead, Greene described the period blandly as "when we separated from the Crown and started our own government here."[69] Greene then refused to acknowledge that the American Revolution was an insurrection.[70] And, having been reminded of the violent nature of the historical 1776, Greene claimed not to recall what she meant when, in the wake of January 6th, she expressly compared what had happened at the Capitol to the American Revolution.[71] Greene insisted that she had "always" called for peaceful protest only—never violence.[72]

Representative Greene was fully prepared to exploit the high-minded principles and emotional impact of our Founding era in her own version of "1776." But she refused to accept the violence, bloodshed and, yes, treason, that was essential to the actual events. She was caught in the trap of her own rhetoric. It was an absurd display of doubletalk—and an ahistorical one.

It is clear what was going on: In the closed-loop world of extreme right-wing politics, the Twittersphere, and the dark corners of the Internet, historical references like "1776" provide a seemingly patriotic cover for a deep distrust of government—and for the idea that, even in contemporary times, individual citizens have the right and the duty to take up arms against their government.[73] The argument goes that, if the Founders did it, it cannot be wrong. And anyone who might question that conclusion is unpatriotic. History, or more accurately, cherry-picked history—*bad* history, was being repurposed to justify violence.

But things look dramatically different when what had been sly references exchanged between like-minded people behind digitally closed doors get exposed to the broader political culture—and when what had once been idle talk has turned into ugly action, as on January 6th. This is what we saw at the Greene hearing. Confronted in a court of law, in front of a bank of cameras, with the

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[68] *See* Greene Hearing Transcript, *supra* note 3, at 152-57.
[69] *Id.* at 154.
[70] *See id.* at 154-57.
[71] On Real American's Voice with Steve Bannon, Greene stated that "January 6th was just a riot at the Capitol . . . [a]nd if you think about what our Declaration of Independence says, it says to overthrow tyrants." Aaron Blake, *Marjorie Taylor Greene Says Jan. 6 Riot Was in Line with the Declaration of Independence*, WASH. POST (Oct. 26, 2021), https://www.washingtonpost.com/politics/2021/10/26/marjorie-taylor-greene-says-jan-6-riot-was-line-with-declaration-independence [https://perma.cc/PN25-FZ4G].
[72] *See* Greene Hearing Transcript, *supra* note 3, at 163.
[73] *See, e.g.*, Feuer et al., *supra* note 28; *The Road to Jan. 6: A Year of Extremist Mobilization*, S. POVERTY L. CTR., https://www.splcenter.org/news/2021/12/30/road-jan-6-year-extremist-mobilization [https://perma.cc/LAJ2-TAWS] (last visited Oct. 16, 2022); *The Year in Hate & Extremism Report 2021*, S. POVERTY L. CTR., https://www.splcenter.org/20220309/year-hate-extremism-report-2021 [https://perma.cc/6JZC-VYXB] (last visited Oct. 20, 2022).

full history of 1776 (i.e., that it involved a literal overthrow of governmental authority by violent means), Representative Greene struggled to justify her invocations of history. Greene had to face the fact that the patriots of 1776 were, indeed, insurrectionists—and that they had not been "always peaceful," as Greene claimed she had been.[74] They had, in fact, engaged in treason against their government—exactly what Greene, a sitting member of Congress awash in the rhetoric of "1776," could not publicly admit.[75]

We had found a means to combat the false or distorted history used by originalists: *More history*. *Accurate history*. Representative Greene and her ilk had been happy to use the phrase "1776" and move on, content in the view that 1776 could only be understood as a heroic moment that we would all do well to emulate. But 1776 also involved violence and, yes, insurrection. Exposing that fact, and giving history its full measure, was strategically important in the Greene case. It is perhaps a lesson we can apply in civil rights cases of the future.

III. REFLECTIONS ON THE GREENE HEARING

In the end, our effort to disqualify Marjorie Taylor Greene from the Georgia ballot failed. Judge Beaudrot accepted our arguments on several important legal points, such as: the definition of "engage" (a broad definition, drawn from nineteenth-century court cases,[76] encompassing any voluntary assistance or contribution), the absence of any historical or current requirement that a Section 3 defendant also violated criminal statutes, and the fact that speech—including, for example, "marching orders or instructions to capture a particular objective, or to disrupt or obstruct a particular government proceeding"—can constitute "engaging in" insurrection.[77]

But he also held that there was insufficient evidence to show that Greene had "engaged in insurrection" in a manner sufficient to disqualify her from office.[78] He was unpersuaded that her invocation of "1776" was a call to arms.[79] And he declined to decide

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[74] *See* Greene Hearing Transcript, *supra* note 3, at 274.
[75] *Id.* at 151-57.
[76] *See* United States v. Powell, 65 N.C. 709 (C.C.D.N.C. 1871); Worthy v. Barrett, 63 N.C. 199 (1869).
[77] *See* Initial Decision, Rowan et al. v. Taylor-Greene, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot 14 (Ga. Off. Admin. Hr'gs May 6, 2022).
[78] *See id.* at 17. Additionally, subsequent appeals to Secretary Raffensperger and the Georgia courts were rejected. *See* Final Decision, Rowan et al. v. Taylor-Greene, No. 2222582-OSAH-SECSTATE-CE-57-Beaudrot (May 6, 2022); Order Denying Discretionary Appeal, Rowan et al. v. Raffensperger, No. 2022 CV 364778 (Sept. 1, 2022).
[79] *See* Initial Decision, Rowan et al. v. Taylor-Greene at 16.

whether January 6th was or was not an "insurrection" within the meaning of Section 3.[80]

The case is now, as they say, in the history books. Nevertheless, as we litigators know better than most, "[t]he past is never dead. It's not even past."[81] Future courts look to past experience—and past cases—for guidance. This has already happened in the case of the Greene Disqualification Clause matter. In September 2022, a judge in New Mexico disqualified a state officeholder who was part of the mob that attacked the U.S. Capitol on January 6th. The court's basis was Section 3 of the Fourteenth Amendment—and it cited, among other things, the evidence adduced and the legal points made at the Greene hearing.[82] It is the first time anyone has been barred from office under the Clause since 1869.[83]

For civil rights lawyers like me, losing is a painful, but regular, feature of the work we do; it is a cost of doing business. It is also a feature of history itself. Progress cannot be achieved, or perceived, except against a backdrop of loss and even suffering. In that sense, history, taken seriously, includes failures and reversals, and we can learn from and build upon those just as much as we can from victories. Perhaps the greatest lesson history has for progressive lawyers is that it is nuanced, multifaceted, and complicated. Wins matter, but losses do too. There is no *one* history; there are *many* histories.

The sin of originalism is not that it looks to history for answers, but that it claims that history has but one answer—an answer that, conveniently, aligns with a particular ideological agenda.[84] If that view is to be confronted effectively, history must be taken seriously. For this reason, I was pleased to see that the American Historical Association and the Organization of American Historians submitted a lengthy amicus brief in *Dobbs* describing the history of abortion regulations in America and England going back

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[80] *See id.* at 17-18 (stating that although January 6th was "truly tragic . . . [and] [m]ultiple lives were lost, including those of law enforcement officers who died defending the Capital. . . . Whether the Invasion of January 6 amounted to an insurrection is . . . not a question for this [c]ourt to answer at this time.").

[81] WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1st ed. 1951).

[82] *See* State of New Mexico et al. v. Griffin, D-1010-CV-2022-00473 4 (Sept. 6, 2022).

[83] *See* CREW Press Release, *supra* note 51.

[84] Constitutional scholar Erwin Chemerinsky contends that the main argument in support of originalism—that it constrains judges—has one critical flaw: "[O]riginalists often abandon the method when it fails to give them the results they want. . . . Conservative [J]ustices use originalism when it justifies conservative decisions, but they become non-originalist when doing so serves their ideological agenda." ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 147 (2022).

nearly two centuries before *Roe v. Wade*.[85] The *Dobbs* majority largely ignored this history because it was inconsistent with the Court's desired outcome.[86] But, look in the record and you will find it there—for history's sake.

CONCLUSION

In our Nation's history, there is much that provokes feelings of shame and even rage. But there is also much more than that—much that is better, much that is richer, much that explains, and much that inspires. As Gunnar Myrdal, the Swedish economist and social scientist, wrote in his seminal work on race in the United States, America is "conservative in fundamental principles . . . [b]ut *the principles conserved are liberal* and some, indeed, are radical."[87] Civil rights lawyers need not cherry-pick from history or ignore it; we can embrace history in its fullness and hold it up to the light for consideration. This is one way to combat the hijacking of history—or at least it was in one case, earlier this year, before an administrative law judge in Georgia.

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[85] *See* Brief for American Historical Association & Organization of American Historians as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (No. 19-1392).

[86] *See History, the Supreme Court, and* Dobbs v. Jackson, AM. HIST. ASS'N (Aug. 31,2022), https://www.historians.org/publications-and-directories/perspectives-on-history/september-2022/history-the-supreme-court-and-emdobbs-v-jackson/em-joint-statement-from-the-american-historical-association-and-the-organization-of-american-historians [https://perma.cc/BVB5-6EP7] (statement from the American Historical Association and the Organization of American Historians expressing "dismay[] that the [Court in *Dobbs*] declined to take seriously the historical claims" in their brief).

[87] GUNNAR MYRDAL, AN AMERICAN DILEMMA 7 (1944) (emphasis added).